Supreme Court, U.S.
FILED
AUG 24 1989
JOSEPH F. SPANIOL, CLERK

NO. 89-128

IN THE

Supreme Court of the United States

October Term 1989

John A. Northen, Trustee in Bankruptcy
for Gordon Foods, Inc.
Petitioner

v.

Quinn Wholesale, Inc.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT

Counsel of Record
Michael E. Weddington
Amos U. Priester, IV
Smith, Anderson, Blount,
Dorsett, Mitchell
& Jernigan
Post Office Box 12807
Raleigh, N.C. 27605
(919) 821-1220
Counsel for Respondent

August 23, 1989

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

QUESTION PRESENTED FOR REVIEW

Under the Bankruptcy Code, 11 U.S.C. §§101(50) and 549, does a payment made by a check constitute a "transfer" as of the time of delivery of the check?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, John A. Northen, trustee in bankruptcy for Gordon Foods, Inc., and the respondent, Quinn Wholesale, Inc.[1]

---

[1] Quinn Wholesale, Inc. is a subsidiary of Scrivner, Inc., which in turn is a subsidiary of Haniel Corp.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
LIST OF PARTIES	iii
TABLE OF AUTHORITES	v
SUMMARY OF ARGUMENT FOR DENIAL OF WRIT	1
ARGUMENTS	4
I. This Court should deny the Petition for Writ of Certiorari as the Court of Appeals correctly decided the question presented in this case	4
II. The decision of the Court of Appeals does not conflict with this Court's decision in Bank of Marin v. England and other decisions of this Court	7
III. The decision of the Court of Appeals will assist the lower federal courts in the construction and administration of the Bankruptcy Code	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

	Page
Bank of Marin v. England, 385 U.S. 99 (1966)	2, 8, 11
Butner v. United States, 440 U.S. 48 (1979)	12
In re Fasano/Harriss Pie Company, 43 Bankr. 871 (Bankr. W.D. Mich. 1984)	5
In re Hoffman, 51 Bankr. 42 (Bankr. W.D. Ark. 1985)	10
In re Midwest Boiler & Erectors Inc., 54 Bankr. 793 (Bankr. E.D. Mo. 1985)	5
In re Trois Etoiles, Inc., 16 B.C.D. 698 (B.A.P. 9th Cir. 1987)	3, 18
In re White River Corporation, 799 F.2d 631 (10th Cir. 1986) ..	5
Kirk Co. v. Styles, Inc., 261 N.C. 156, 134 S.E.2d 134 (1963)	14
McKenzie v. Irving Trust Company, 323 U.S. 365 (1944)	13
O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35 (1st Cir. 1984)	6

Cases (cont'd) Page

Quinn Wholesale, Inc. v. John A. Northen, 873 F.2d 77 (4th Cir. 1989) 3

STATUTES AND OTHER AUTHORITIES

Statutes

11 U.S.C. §101(50) 3, 14

11 U.S.C. §542(c) 9, 10

11 U.S.C. §547 ..... 5, 20

11 U.S.C. §549 ..... 2, 10 17

N.C.Gen.Stat. §25-3-104(1)(B).. 14

Other Authorities

Sup. Ct. R. 17.1 1

4 Collier on Bankruptcy ¶547.16[4] (15th ed. 1979)... 5, 18

Senate Report No. 95-989, 95th Cong. 2d Sess. 84 (1978)..... 9

SUMMARY OF ARGUMENT FOR DENIAL OF WRIT

The Petitioner's Petition for Writ of Certiorari fails to satisfy the considerations governing review on certiorari set forth in Supreme Court Rule 17.1. There are several reasons why the Petition fails to supply an adequate basis for this Court to exercise its discretion to review the Fourth Circuit decision of which the Petitioner complains.

First, the decision reached by the Court of Appeals is simply and clearly the correct one. A check delivered by a debtor to its creditor prior to the filing of a bankruptcy petition, accepted and paid by the debtor's bank without knowledge of the bankruptcy and in the ordinary course of business after the filing of the petition, does not constitute an avoidable transfer under

11 U.S.C. §549. In reaching their decisions, the District Court and Court of Appeals took into account certain legal and practical considerations which compel the conclusion that the transfer in question is not a post-petition transfer within the meaning of 11 U.S.C. §549.

Second, the decision reached by the Court of Appeals is not inconsistent with this Court's decision in Bank of Marin v. England, 385 U.S. 99 (1966), or other decisions of this Court. The question now before this Court was not addressed in Bank of Marin and the facts now before this Court are clearly distinguishable from those in Bank of Marin. However, even to the extent that Bank of Marin or other decisions of this Court may be applicable, the decision

reached by the Court of Appeals is not in conflict with those decisions.

Finally, rather than raising significant and recurrent problems for the lower federal courts in the construction and administration of the Bankruptcy Code, 11 U.S.C. §101 et seq., the decision of the Court of Appeals will have the opposite effect. To the extent that in the past there has been any confusion among the lower federal courts concerning the issue now before this Court, that confusion was fostered by the fact that no appellate level court had considered the question. Within the last two years, however, two appellate courts have considered the question and both have reached the same conclusion. See Quinn Wholesale, Inc. v. John A. Northen, 873 F.2d 77 (4th Cir. 1989); In re Trois Etoiles, Inc.,

16 B.C.D. 698 (B.A.P. 9th Cir. 1987). As these recent appellate decisions serve to invalidate contrary decisions and provide consistent instruction and guidance to the lower federal courts in their circuits, decisions will become more uniform and all lower federal courts will be given a "bright line" by which the Bankruptcy Code can be construed and administered.

ARGUMENTS

I. **This Court should deny the Petition for a Writ of Certiorari as the Court of Appeals correctly decided the question presented in this case.**

Simply put, this Court should refuse to grant the Petition because the decision reached by the Court of Appeals is the correct decision.

First, the decision is in accord with the majority of the decisions which

have addressed this issue under the avoidance powers of the bankruptcy trustee pursuant to 11 U.S.C. §547. See 4 Collier on Bankruptcy ¶547.16[4] (15th ed. 1979) (citing cases). Thus, the desired result of uniformity of federal decisions has been furthered by the Court of Appeals' decision.

Second, the decision reached by the Court of Appeals comports with commercial reality in that, in modern financial transactions, a check is considered the equivalent of cash. Id. Furthermore, the Bankruptcy Code encourages the use of checks in business transactions and encourages creditors to deal with failing businesses. See, e.g., In re White River Corporation, 799 F.2d 631 (10th Cir. 1986); In re Midwest Boiler & Erectors, Inc., 54 Bankr. 793 (Bankr. E.D. Mo. 1985); In re

Fasano/Harriss Pie Company, 43 Bankr. 871 (Bankr. W.D. Mich. 1984). Viewing the transfer of the property of the debtor to be the date of delivery of a check best implements these two policies and is "in accord with commercial reality." O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35, 37 (1st Cir. 1984).

On the other hand, the construction urged by the Petitioner would fail to recognize this "commercial reality" and would require that businesses necessarily curtail the use of checks and, instead, insist that all of their transactions with individuals or entities which are even remotely financially troubled be in cash or on a "cash equivalent basis" for fear that the transfer would later be avoided due to an unlucky or precipitous bankruptcy

filing. Such actions would inevitably lead to a reduction in the amount of credit available to financially troubled businesses and in the number of creditors willing to deal with them. This result could not have been intended by Congress, as one of the stated purposes of the Bankruptcy Code is the rehabilitation and reorganization of failing businesses.

For the reasons set forth above, together with those additional reasons articulated by the District Court in its Memorandum Opinion and by the Court of Appeals in its affirmance of that decision, the Petition should be denied.

II. The decision of the Court of Appeals does not conflict with Bank of Marin v. England or other decisions of this Court.

Petitioner argues that the decision of the Court of Appeals conflicts with

the decision of this Court in Bank of Marin v. England, supra, and other decisions of this Court. To the contrary, the decision of the Court of Appeals is wholly consistent with Bank of Marin and other relevant decisions of this Court.

In the first place, the facts in Bank of Marin are clearly distinguishable from the facts of this case. In Bank of Marin, the sole question presented to the Court was "whether a bank which honored checks of a depositor drawn before its bankruptcy, but presented for payment after it had filed a voluntary petition in bankruptcy, is liable to the trustee for the amount of the checks paid where the bank had no knowledge or notice of the proceeding." 385 U.S. 99, 100. This Court was not asked, and in fact did not rule, on the

question of the third party payee's liability. Conversely, in the case now before this Court, the sole question presented concerns the payee's liability for a check delivered before bankruptcy but presented for payment after the filing of the bankruptcy petition.

The fact that 11 U.S.C. §542(c) has expressly affirmed and codified the Bank of Marin decision,[2] a point on which Petitioner places great emphasis, actually provides persuasive evidence that Bank of Marin did not address the facts before the Court in this case. 11 U.S.C. §542(c) deals with the liability of a payor-transferor, such as the drawee bank in Bank of Marin, but makes no mention at all of the liability of a

---

[2] See Senate Report No. 95-989, 95th Cong. 2d Sess. 84 (1978).

payee-transferee, such as Respondent in the instant case. Further evidence that Bank of Marin is not controlling under the facts of this case is found in the authorities cited by Petitioner in support of his contentions. In those cases, not one court relied upon Bank of Marin in making its decision.[3]

Futhermore, even to the extent that Bank of Marin may apply, its holding supports the decision of the Court of Appeals in this case. In Bank of Marin, the Court rejected the respondent's argument that the relevant "transfer" within the meaning of §70d(5) of the Bankruptcy Act (the predecessor of 11

---

[3] Bank of Marin is cited in only one of those decisions, and that citation was in reference to the conclusion that 11 U.S.C. 542(c) codified Bank of Marin. In re Hoffman, 51 Bankr. 42 (Bankr. W.D. Ark. 1985).

U.S.C. §549) occurred upon payment by the drawee of the drawer bankrupt's checks after the date of the filing of the bankruptcy petition. 385 U.S. 99, 102-103. While the Court did not expressly state when the transfer would be deemed to have occurred, the only other possible time the transfer could have occurred would have been upon delivery of the check, just as determined by the Court of Appeals in this case. As the Court noted in Bank of Marin, "the force of §70d(5) and subsection 18(f) can be maintained by imposing liability on the payee of the checks where he has received a voidable preference or other voidable transfer . . . ." 385 U.S. at 103 [emphasis added]. The Bank of Marin Court realized that fixing the date of transfer as the date of delivery would

make the relevant transfer occur pre-petition and could leave that transaction open to attack by the bankruptcy trustee as a voidable preference. The same prospect exists for a bankruptcy trustee under the Court of Appeals' decision challenged in this case. Accordingly, Bank of Marin clearly is not controlling and, to the extent it may apply, the decision reached by the Court of Appeals in the case now before this Court is consistent with that decision.

In like vein, the decision of the Court of Appeals does not conflict with this Court's decision that the rights of parties to a bankruptcy proceeding are "created by and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979). While reference to applicable state law may be helpful with respect to

certain discrete questions arising under the Bankruptcy Code, it must be remembered that those questions are to be determined in the broader context of a uniformly interpreted and applied federal law. As this Court has said, "[w]hat constitutes a transfer . . . is necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States." McKenzie v. Irving Trust Company, 323 U.S. 365, 369-70 (1944). Accordingly, the definition given to the term "transfer" by the Court of Appeals in this case is consistent both with prior decisions of this Court in determining property rights and prior decisions of this Court

in defining terms found in federal statutes.[4]

There is no conflict between the decision of the Court of Appeals and any decision of this Court, including Bank

---

[4] State law shows that the applicable "transfer" in this case took place upon the delivery of the check prior to the filing of the bankruptcy petition. Pursuant to applicable North Carolina law and the Uniform Commercial Code as adopted in North Carolina, a check is an unconditional promise to pay funds and upon signing and delivering the check the drawer has completed all of the affirmative acts necessary to make a transfer of money. N.C.Gen.Stat. §25-3-104 (1)(B); Kirk Co. v. Styles, Inc., 261 N.C. 156, 134 S.E.2d 134 (1963). Thus, regardless of when "title" to the funds vests in the payee, delivery of the signed check is an unequivocal mode of parting with the debtor's interest in those funds and, subject only to subsequent affirmative acts necessary to negate that transfer, the debtor's relinquishment of funds is complete. Such a relinquishment of funds fits within the broad definition of "transfer" found in 11 U.S.C. §101 (50).

of Marin v. England, and the Petition should be denied.

III. The decision of the Court of Appeals will assist the lower federal courts in the construction and administration of the Bankruptcy Code.

The Petitioner next contends that the decision of the Court of Appeals will raise "significant and recurring problems" in the lower federal courts in the construction and administration of the Bankruptcy Code. In particular, the Petition appears to identify three specific "problems" that Petitioner contends will arise from the Court of Appeals' decision.

First, Petitioner contends that the decision of the Court of Appeals will confuse the lower courts since that "portion of the estate of the debtor represented by bank deposits is not and

cannot now be fixed at the commencement of the case," and that the "practical effect of the decision below is to leave the bankruptcy court and trustee uncertain of and unable to determine the debtor's estate until checks tendered prepetition are presented post-petition." Petition at 10-11. Contrary to Petitioner's implication, the decision of the Court of Appeals does not erase any "bright line" or create problems that do not already exist. For example, even if on occasion the trustee must wait until a check tendered prepetition has been presented and honored postpetition before knowing the exact amount of "good funds" available to him, the trustee can determine that amount upon a simple review of the debtor's books and records. Furthermore, even if the position

advanced by Petitioner was followed, the trustee would still be uncertain of and unable to determine the debtor's estate until the occurrence or non-occurrence of other affirmative events, such as a bank exercising its right of set-off against those funds. Thus, the decision of the Court of Appeals does not create any additional problems of administration that are not already inherent and extant in the bankruptcy system.

Next, Petitioner argues that the decision of the Court of Appeals will only serve to confuse the lower courts as the majority of lower courts which have considered this question under 11 U.S.C. §549 have reached a contrary conclusion. In truth, the Court of Appeals' decision will have the opposite effect. With this decision by the Court

of Appeals and with the decision of the Ninth Circuit Bankruptcy Appellate Panel in In re Trois Etoiles, Inc., 16 B.C.D. 698 (B.A.P. 9th Cir. 1987), the only two appellate level courts to consider this question in the context of 11 U.S.C. §549 have reached the same conclusion. Furthermore, the majority of all decisions, including all of the appellate courts which have dealt with this issue under 11 U.S.C. §547(c) have agreed that the pertinent transfer is made upon delivery of the check if the check is eventually honored within a reasonable time. See 4 Collier on Bankruptcy ¶547.16[4] (15th ed. 1979) (citing cases). Instead of causing confusion, the decision below, the Ninth Circuit Bankruptcy Appellate Panel's decision in In re Trois Etoiles, supra, and the number of cases reaching the

same result under other sections of the Bankruptcy Code will aid in the avoidance of confusion in this area as recent appellate court decisions serve to invalidate contrary decisions of lower courts in their circuits.

Finally, Petitioner contends that one of the principal objectives of the Bankruptcy Code -- ratable distribution of the debtor's assets among creditors -- is defeated by the Court of Appeals' decision since a creditor receiving a pre-petition check honored post-petition will receive his or her entire claim in full. Quite the contrary, the decision of the Court of Appeals does not favor these creditors: rather, the decision of the Court of Appeals recognizes commercial reality and treats the payment by check as the "cash" transactio.. that all concerned intend it

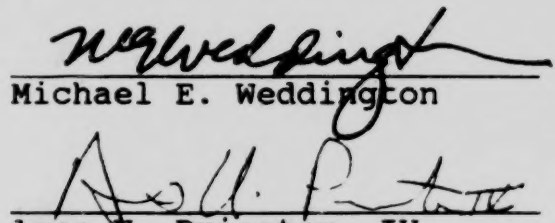
to be. Far from defeating the purposes of the Bankruptcy Code, this "cash transaction" eliminates the check payee as a creditor of the bankruptcy estate, although the transaction remains open to attack by the bankruptcy trustee pursuant to his other avoidance powers (e.g., the preference provisions of 11 U.S.C. §547). Instead of being favored or singled out for a special status, a creditor receiving a check prior to the filing of the bankruptcy petition which is honored after the filing is treated exactly like a creditor which demanded a cash payment on delivery prior to the filing of the bankruptcy petition. The laudatory objectives of the Bankruptcy Code in seeking to obtain ratable distribution of assets among creditors simply is not adversely affected by the decision of the Court of Appeals.

It is therefore clear that the decision of the Court of Appeals will not cause problems for the lower federal courts in the construction and administration of the Bankruptcy Code, and, in fact will assist those courts in that endeavor.

CONCLUSION

For the reasons set forth above, and for such other reasons as this Court should find persuasive, Respondent contends that a writ of certiorari should not be issued to review the judgment and opinion of the Fourth Circuit Court of Appeals in this case.

Respectfully submitted this 23rd day of August, 1989.



Michael E. Weddington

Amos U. Priester, IV
Counsel of Record for
Respondent
SMITH, ANDERSON, BLOUNT,
DORSETT, MITCHELL
& JERNIGAN
Post Office Box 12807
Raleigh, N.C. 27609
(919) 821-1220

No. 89-128

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

John A. Northen, Trustee in Bankruptcy
for Gordon Foods, Inc.
Petitioner

v.

Quinn Wholesale, Inc.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

AFFIDAVIT OF SERVICE AND MAILING
RESPONSE TO PETITION FOR CERTIORARI

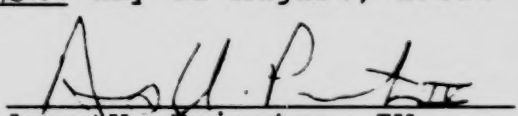
I, Amos U. Priester, IV, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

I hereby certify that on August 23, 1989 an envelope was deposited in the United States Mail addressed to the Clerk of Supreme Court of the United States, first-class, postage prepaid, containing 40 copies of the Response to Petition for Writ of Certiorari in the above-entitled case.

I further certify that on August 23, 1989 an envelope was deposited in the United States mail addressed to John A. Northen, Esq., Post Office Box 2208, Chapel Hill, North Carolina 27515-2208, counsel for Petitioner herein, by first class mail, postage prepaid, containing 3 copies of the Response to Petition for Writ of Certiorari in the above-entitled case. I further certify that all parties required to be served have been served.

This the 23rd day of August, 1989.



Amos U. Priester, IV
Smith, Anderson, Blount,
Dorsett, Mitchell
& Jernigan
Post Office Box 12807
Raleigh, N.C. 27605
(919) 821-1220
Counsel for Respondent